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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Regulatory Treatment of LEC Provision)	
of Interexchange Services Originating in the)	CC Docket No. 96-149
LEC's Local Exchange Area)	
)	
and)	
)	
Policy and Rules Concerning the)	CC Docket No. 96-61
Interstate, Interexchange Marketplace)	

**OPPOSITION OF SBC COMMUNICATIONS INC.
TO JOINT PETITION FOR RECONSIDERATION OF
RCN TELECOM SERVICES, INC. AND HYPERION TELECOMMUNICATIONS, INC.**

SBC Communications Inc., by its attorneys and pursuant to Section 1.429 of the Commission's Rules, respectfully files this Opposition to the Joint Petition for Reconsideration ("Petition") herein filed by RCN Telecom Services, Inc. and Hyperion Telecommunications, Inc. ("Joint Petitioners") on August 4, 1997. In their Petition, the Joint Petitioners requested reconsideration of the Commission's *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61* (the "Order"), adopted on April 17, 1997, and released on April 18, 1997.

In the Order, the Commission revised its approach to defining product and geographic markets in accordance with its interpretation of the 1992 Department of Justice/Federal Trade Commission Horizontal Merger Guidelines. The Order also classified the Bell operating companies' ("BOCs") long distance affiliates as "non-dominant" carriers in the provision of interstate, domestic, long distance services that originate either inside or outside the areas in which a BOC

provides local telephone services. The Order also adopted the same regulatory treatment of the BOCs' affiliates in the provision of in-region, international services.

In their Petition, the Joint Petitioners alleged that: (1) the Commission's decision was based on speculative and general assessments rather than on specific showings of proof by the BOCs; (2) the Commission's "over-reliance" on *ex post* remedies to respond to improper exercise of market power was misplaced; and (3) the Commission should clarify how its revised geographic market definition was based on the 1992 Merger Guidelines.

SBC submits that none of these allegations merits reconsideration by the Commission. In its carefully-reasoned Order, the Commission considered the arguments in each of the areas that the Joint Petitioners now complain about, and the Commission reached a decision that was clearly supported by the record. The Commission should thus reject the Joint Petitioners' Petition in its entirety.

I. The Commission's Determination of the Lack of Market Power of the BOC Affiliates Was Supported by the Record in this Proceeding and Was Based on an Appropriate Application of the Tests Historically Used to Assess Market Power.

The Commission's Rules define a "dominant carrier" as a carrier that possesses "market power (i.e., power to control prices)," and a "non-dominant carrier" as "[a] carrier not found to be dominant [i.e., one that does not possess market power]."¹ The Commission has historically assessed market power in the relevant market based on an examination of:

- a. the carrier's market share;
- b. the supply elasticity of the market;

¹47 C.F.R. § 61.3(o), (u).

- c. the demand elasticity of the carrier's customers (or, in a BOC's case, potential customers); and
- d. the carrier's cost structure, size, and resources.²

In the Order herein, the Commission concluded that "the BOC interLATA affiliates should be classified as dominant carriers in the provision of in-region, interstate, domestic, interLATA services *only if* the affiliates have the ability to raise prices of those services by restricting their own output of those services."³ The Commission then examined, *based on the record of the proceeding*, the traditional factors listed above that have been used to determine whether a carrier possesses market power. The Commission noted that "[m]ost commenters that address the issue agree that each of the traditional market factors weighs in favor of classifying the BOC interLATA affiliates as non-dominant."⁴

In connection with the first factor, the Commission found that a BOC interLATA affiliate would begin business with a zero market share, although that factor alone would not be sufficient for a non-dominant classification since the BOC affiliate might gain significant market share shortly after its entry.⁵ As to supply substitutability, *based on the record of this proceeding*, the Commission concluded that "AT&T and its competitors, which currently serve all interLATA customers, should be able to expand their capacity sufficiently to attract a BOC interLATA affiliate's customers if the affiliate attempts to raise its interLATA prices."⁶ As to demand substitutability,

²In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996) ("Non-Accounting Safeguards NPRM"), ¶ 133.

³Order, ¶ 85 [emphasis supplied].

⁴Order, ¶ 94.

⁵Order, ¶ 96.

⁶Order, ¶ 97.

based on the record of this proceeding, the Commission concluded that “the purchasing decisions of most customers of domestic interexchange services are sensitive to changes in price, and customers would be willing to shift their traffic to an interexchange carrier’s rival if the carrier raises its prices.”⁷ Finally, *based on the record of this proceeding*, the Commission found that, “given the presence of existing interexchange carriers, including such large well established carriers as AT&T, MCI, Sprint, and LDDS, . . . the cost structure, size, and resources of the BOC interLATA affiliates are not likely to enable them to raise prices above the competitive level for their domestic interLATA services.”⁸

Even after that examination of the historic factors used to determine market power, however, the Commission went further to examine, *based on the record*, whether other factors, such as BOC control of bottleneck access facilities, improper allocation of costs, unlawful discrimination, or ability to engage in price squeezes, might tip the balance such that a BOC interLATA affiliate could exercise market power in its pricing practices.⁹ In each case, the Commission concluded that existing safeguards, short of regulation of BOC interLATA affiliates as dominant carriers, were sufficient to guard against any abuses by the BOC affiliates. The Commission thus accorded “non-dominant treatment to the BOCs’ provision of in-region interLATA services . . . predicated upon their full compliance with the structural, transactional, and nondiscrimination requirements of section 272 and [the Commission’s] implementing rules.”¹⁰

⁷Id.

⁸Id.

⁹Order, ¶¶ 98-130.

¹⁰Order, ¶ 134.

Thus, the Commission's analysis of the regulatory treatment of BOC interLATA affiliates was neither careless nor "speculative," as alleged by the Joint Petitioners. The Order made extensive use of the record in this proceeding as well as the records in related proceedings in reaching the conclusion that the BOC interLATA affiliates could not exercise any market power to raise their prices by raising their rivals' costs.

In contrast, the Joint Petitioners could point to nothing in the record that would support a contrary result. The Joint Petitioners instead whine that the BOC interLATA affiliates might be such strong competitors in the interLATA market that *all* competitors, including smaller competitors and even competitive local exchange carriers that chose not to compete in the long distance market, might not survive. Such claims are, of course, irrelevant to the market power analysis that was properly carried out by the Commission. The regulation of carriers as either dominant or non-dominant is fashioned to protect *competition* in the relevant market, not particular *competitors*. Furthermore, it is incredible that the Joint Petitioners claim that they are able to compete successfully with huge, well-established interexchange carriers but not with new entrants such as BOC interLATA affiliates. The Commission should dismiss the preposterous premise of the Joint Petitioners that any market failure of a small interexchange (or even exchange) competitor must be blamed on the non-dominant market entry of BOC interLATA carriers along with their equally disingenuous conclusion that BOC interLATA affiliates should not be afforded non-dominant regulatory treatment unless the BOCs can prove that no small competitors will go out of business.

II. The Commission did not “Over-Rely” on *Ex Post* Remedies to Respond to BOC Actions.

Contrary to allegations of the Joint Petitioners, the “*ex post*” remedies for “improper exercise of market power”¹¹ or “predatory behavior”¹² are not toothless remedies that would require large amounts of competitors’ resources or time to prosecute. A complaint that a BOC has not complied with the requirements of Section 272 must be refuted in an extremely timely manner by that BOC, or interLATA operating authority may be suspended; significantly, the Commission has ruled that it will not employ a presumption of reasonableness on behalf of a BOC in the context of adjudicating such a complaint.¹³ Thus, if BOCs do not comply with Section 272, then they can be put out of business. The Commission’s reliance on that statutory mandate is *not* misplaced.

¹¹Petition, p. 8.

¹²Petition, p. 9.

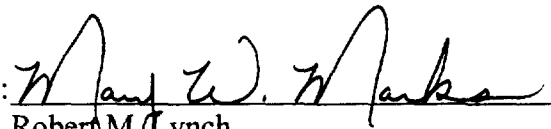
¹³In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (rel. Dec. 24, 1996).

III. Conclusion

As shown above, the allegations raised by the Joint Petitioners do not constitute grounds for reconsideration. The Commission's Order was based on the record in the proceeding. The Petition, by contrast, offered only irrelevant premises and conclusions about the viability of all competitors in the interexchange market in support of its requests for unnecessary and competitively harmful regulation of BOC interLATA affiliates. The Commission should thus reject the Joint Petitioners' Petition for Reconsideration.

Respectfully submitted,

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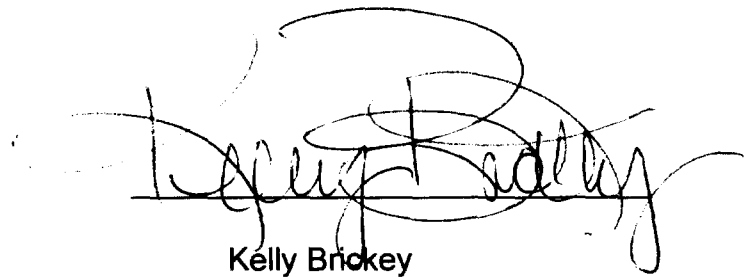
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CERTIFICATE OF SERVICE

I, Kelly Brickey, hereby certify that the foregoing "Opposition of SBC Communications to Joint Petition for Reconsideration of RCN Telecom Services, Inc. and Hyperion Telecom, Inc.", have been served on September 8, 1997, to the Parties of Record.

A handwritten signature in black ink, appearing to read "Kelly Brickey", is written over a horizontal line. The signature is stylized with large loops and flourishes.

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